No. 97-854

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICROSOFT CORPORATION, *et al.*,

Petitioners,

—v.—

DONNA VIZCAINO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICROSOFT CORPORATION'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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List of Parties and Rule 29.6 Statement

There have been no changes in the information previously submitted by petitioner Microsoft Corporation, pursuant to Rule 29.6, in its petition for writ of certiorari.

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The Ninth Circuit *en banc* majority failed to follow settled principles of state contract law and refused even to acknowledge an intermediate state appellate court decision that is directly on point—in violation of this Court's decisions in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940), and *West* v. *AT&T*, 311 U.S. 223 (1940). None of the arguments advanced by respondents in their brief in opposition make this case any less appropriate for summary review by this Court.

Like the Ninth Circuit *en banc* majority, respondents pay lip service to the notion that their claim for ESPP benefits is governed by state contract law, and then promptly proceed to ignore the terms of their actual contracts with petitioner Microsoft Corporation ("Microsoft"). Those contracts expressly provide that respondents are *not* entitled to ESPP benefits.

Rather than examine the terms of their contracts, respondents purport to construe the terms of the ESPP itself. Respondents argue that "[b]y its express terms, the ESPP is open to 'any employee' who meets certain service requirements," and they assert that Microsoft has "admitted that [respondents] are 'employees' within the meaning of the ESPP and that they had sufficient service." (Opp'n at 5.) Respondents further contend that "it is the facts concerning employment that determine employee status, not the words of the contract alone." (*Id.* at 20.)

In other words, respondents claim that they are entitled to participate in the ESPP because they are purportedly covered by the provisions of the plan, regardless of whether they can show that they have a valid contractual right to participate in the ESPP. As a result, respondents (like the Ninth Circuit *en banc* majority) improperly treat the ESPP as if it were an ERISA plan, ignoring settled principles of state contract law in the process.

Respondents' brief in opposition is replete with other misstatements that require a reply.

1. **Microsoft's petition presents a question of exceptional importance.** Respondents attempt to downplay the significance of this case, arguing that it involves only "a single contract of a particular employer." (Opp'n at 11.) Respondents state: "the Ninth Circuit's decision does not control even future cases in Washington State, let alone the remaining 49 states." (*Id.* at 26.) Yet five different national associations have submitted two *amicus curiae* briefs in support of Microsoft's petition stressing the importance of this case to their members. Those associations would not have gone to that effort if, as respondents contend, this case involves only "a single contract of a particular employer." (*Id.* at 11.)

Attesting to the importance of the question presented by Microsoft's petition, the Chamber of Commerce of the United States (the world's largest business federation representing more

than three million businesses and organizations) and the Association of Private Pension and Welfare Plans (a trade association with more than 240 members, including many Fortune 500 companies) state as follows in their motion for leave to file their *amicus curiae* brief:

> The issue raised by the Petition—whether individuals who execute written freelance agreements specifically acknowledging that they are not entitled to employee benefits subsequently may sue for such benefits by claiming that they are common law employees—is of direct and immediate interest to the Amici and their members. Amici and their members wish to preserve their right to contract with freelancers on mutually advantageous terms, which may include agreements concerning the availability of benefits. The decision below threatens this freedom, and thereby jeopardizes the stability of this large segment of the American workforce.

Similarly, the Information Technology Association of America, the American Electronics Association and the Software Publishers Association—three leading trade associations in high technology industries—state in their *amicus curiae* brief that "[t]his case is of exceptional importance to the industries represented by [them]." According to these *amici*, the Ninth Circuit *en banc* majority's decision in this case "upsets the legitimate, settled contractual rights of businesses throughout all industries." The *amici* state, however, that the "information technology" and electronics industries "are particularly at risk from the fallout of *Vizcaino*" because of (i) "their extensive use of highly skilled alternative workers, such as computer programmers, product testers and systems analysts," and (ii) their "common use of equity compensation to reward employees."

2. The Ninth Circuit was not at liberty to ignore the Washington Court of Appeals' decision in *Daniel* v. *Pacific Northwest Bell Telephone Co.*, 580 P.2d 652 (Wash. Ct. App. 1978). Relying on this Court's decision in *King* v. *Order of*

United Travelers of America, 333 U.S. 153 (1948), respondents suggest that the Ninth Circuit was not bound by *Daniel* because the intermediate appellate court that rendered that decision has "jurisdiction over only Eastern Washington" (Opp'n at 14), and because "the Washington Supreme Court reverses over half of the decisions of the Washington court of appeals accepted for discretionary review"(*id.* at 15). Respondents' reliance on *King* is misplaced.

In *King*, this Court reiterated the bright-line rule that "federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise." 333 U.S. at 158 (citing *Six Companies of Cal.* v. *Joint Highway Dist. No. 13 of Cal.*, 311 U.S. 180 (1940); *West* v. *AT&T*, 311 U.S. 223 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940)). The Court next noted that in *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940), the Court "went further and held that a federal court had to follow two decisions announced four years earlier by the New Jersey Court of Chancery, a court of original jurisdiction." 333 U.S. at 158. The Court explained that although the *Fidelity Union* case did not "lay down any general rule as to the respect to be accorded state trial court decisions," it "took pains to point out that the status of the New Jersey Court of Chancery" was not that of the usual trial court. *Id.* at 159. In particular, this Court noted, among other things, that the New Jersey Court of Chancery has "state-wide jurisdiction" and that "[a] uniform ruling by the Court of Chancery over a course of years was seldom set aside by the state's highest court." *Id.*

Contrary to respondents' suggestion, the Court did not hold in *King* that federal courts are free to ignore a decision of an intermediate state appellate court if that state court lacks state-wide jurisdiction or is sometimes reversed by the state's highest court. Instead, the Court explicitly stated that "federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court

would rule otherwise." *Id.* at 158. Considerations such as whether the state court has state-wide jurisdiction or is reversed with some frequency are relevant only in determining "the respect to be accorded *state trial court decisions*." *Id.* at 159 (emphasis added). There is no dispute that the Washington court that decided *Daniel* is an intermediate appellate court, not a trial court, and thus the "federal courts are bound" by *Daniel* "unless there is persuasive evidence that the highest state court would rule otherwise." *Id.* at 158. No such evidence exists in this case.

3. Just because the Ninth Circuit cited certain Washington Supreme Court decisions does not mean that it correctly applied Washington law. Respondents note that the Ninth Circuit *en banc* majority cited "several Washington Supreme Court cases," as if that fact alone were sufficient to immunize the Ninth Circuit's decision from review. (Opp'n at 9; *accord id.* at 24.) As Microsoft explained in its petition, none of the Washington Supreme Court decisions cited by the Ninth Circuit *en banc* majority is on point. (*See* Pet. at 16 n.6.) In fact, respondents themselves have acknowledged in prior court papers that "there is *no* decision on point from the Washington Supreme Court" (emphasis added). As this Court held in *West*, a federal court is not free to reject, as the Ninth Circuit *en banc* majority did in this case, a decision of an intermediate state appellate court that is directly on point in favor of a decision or decisions of the highest state court that only tangentially relate to the question presented. *See* 311 U.S. at 235.

By the same token, respondents' criticism of the district court for relying "*only* on federal cases" and "not citing or discussing a single Washington decision" (Opp'n at 6 (emphasis in original); *accord, e.g., id.* at 2, 24) is disingenuous. In granting Microsoft summary judgment on respondents' claim for ESPP benefits, the district court adopted by reference the magistrate judge's general analysis of state contract law (A74-75) and cited federal case law only for the proposition that Section 423 of the

Internal Revenue Code "does not create a right of action by [respondents] against Microsoft" (A76).

4. The *Daniel* decision is still good law and thus is binding on the federal courts. Respondents devote much of their brief to arguing that *Daniel* was wrong "when it was originally decided" and has since been "effectively overruled." (*See* Opp'n at 15-17, 18-23.) Respondents' arguments are baseless.

As an initial matter, the Ninth Circuit *en banc* majority did not predicate its refusal to follow *Daniel* on any of the reasons offered by respondents, even though respondents presented those very same arguments to the Ninth Circuit in their response to Microsoft's petition for rehearing. Rather, the Ninth Circuit simply ignored *Daniel*, notwithstanding Judge O'Scannlain's explicit statement in his dissent that *Daniel* "rejected the court's reasoning." 120 F.3d at 1020 (A31). The Ninth Circuit *en banc* majority's decision to ignore *Daniel* speaks volumes about the weakness of respondents' arguments that *Daniel* is no longer good law.

What respondents really want this Court to do is what the Ninth Circuit *en banc* majority did: reject *Daniel* in favor of decisions of the Washington Supreme Court that only tangentially relate to the question presented. This Court should reject that invitation. The Washington Court of Appeals' decision in *Daniel* has "remained on the books" for nearly twenty years "without disapproval" from any court. *King*, 333 U.S. at 158 n.13; *accord Six Companies*, 311 U.S. at 188. The Washington Supreme Court may at some later time endorse, adopt, modify or reject the rule of *Daniel*, but it has not done so yet. Nor has any lower Washington court taken the position that *Daniel* is no longer good law or was wrongly decided. Whether the Washington Supreme Court will some day modify or reject the rule of *Daniel* thus "remains a matter of conjecture." *West*, 311 U.S. at 238. Consequently, the federal courts continue to be bound by *Daniel*.

Respondents incorrectly contend (Opp'n at 16-17) that the Washington Supreme Court "effectively overruled" *Daniel* in *Berg* v. *Hudesman*, 801 P.2d 222 (Wash. 1990). That contention reflects both a substantial over-reading of *Berg* and a misunderstanding of *Daniel*. In fact, *Daniel* is entirely consistent with *Berg*. In *Berg*, the Washington Supreme Court held only that "extrinsic evidence is admissible as to the entire circumstances under which a contract was made, as an aid in ascertaining the parties' intent." 801 P.2d at 229. The Washington Court of Appeals' did *not* hold in *Daniel* that extrinsic evidence was inadmissible to ascertain the parties' intent. To the contrary, the Washington Court of Appeals expressly considered extrinsic evidence in *Daniel*, noting that such evidence established that plaintiff "knew" that his agreements with defendant did not provide for employee benefits. *See* 580 P.2d at 653 ("Mr. Daniel knew that these items were not provided by the agreement because as late as March 23, 1973, he wrote the telephone company seeking some arrangement for these items."). Similarly, respondents' contention that *Daniel* "was inconsistent with Washington law even when it was originally decided" (Opp'n at 18-23) overlooks the fact that the Washington Supreme Court denied review in *Daniel*. *See* 90 Wash. 2d 1025 (Wash. 1978).

All that the Washington Court of Appeals held in *Daniel* was that plaintiff was bound by the contract that he voluntarily and knowingly signed—which provided that he was an independent contractor not entitled to employee benefits—and thus was precluded "from showing that in actuality he was an employee, and not an independent contractor." 580 P.2d at 653-54. That unremarkable holding, which is completely consistent with *Berg*, is still good law.

Finally, it is ironic that respondents would argue that *Daniel* has been effectively overruled because it purportedly precludes consideration of extrinsic evidence. The extrinsic evidence of the parties' intent in this case uniformly supports Microsoft's position. Consistent with respondents' agreements with Microsoft,

the extrinsic evidence confirms that respondents had no expectation of receiving the benefit they now seek and that Microsoft had no expectation of providing such a benefit. The magistrate judge explained:

> As with the other employee benefits governed by state law, it is uncontested that Plaintiffs signed the above-described [Independent Contractor Agreement] and companion papers acknowledging that they were responsible for their "own benefits." As with the other benefits governed by state law, no Plaintiff claims that he/she was ever told by anyone at Microsoft that he/she had a right to participate in the ESPP, and to the extent that any of them knew about the plan or saw company materials concerning the plan, they did not consider themselves eligible to participate in the ESPP because of their status as freelancers. The uncontested evidence is thus that Microsoft never expressly offered the ESPP benefit to Plaintiffs, and no Plaintiff had any expectation of receiving it as a portion of his/her compensation for any services performed by any Plaintiff as a freelancer on behalf of Microsoft. Rather, all Plaintiffs understood that they would *not* receive the benefit.

(A103.) Such extrinsic evidence of the parties' intent is obviously supports Microsoft's position that respondents are not entitled to ESPP benefits.

5. Respondents fail to offer a good reason why, at a minimum, the dispositive state-law question should not be certified to the Washington Supreme Court. Even though they themselves sought certification in the court of appeals, respondents argue that this Court should reject Microsoft's "remarkable proposal" that the Court grant certiorari, vacate the judgment of the court of appeals and remand with instructions to certify the dispositive state-law question. (Opp'n at 24.) Contrary to respondents' assertion (*id.* at 25), this Court has never held that certification is appropriate only to resolve the construction of a state statute subject to a federal constitutional

challenge. In *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974), this Court emphasized that certification "helps build cooperative judicial federalism." Certifying the dispositive state-law question in this case—which has divided numerous federal jurists as well as *amicus curiae* supporting both parties—to the Washington Supreme Court would be consistent with such co-operative judicial federalism.

Lastly, although respondents criticize Microsoft's formulation of the state-law question as "incomplete and biased" (Opp'n at 24), they fail to offer a formulation of their own. Their failure to do so undermines their criticism.

Conclusion

This Court should grant certiorari and summarily reverse the judgment of the court of appeals for refusing to apply the rule of law announced by the Washington Court of Appeals in *Daniel* v. *Pacific Northwest Telephone Co.*, 580 P.2d 652 (Wash. Ct. App.), *review denied*, 90 Wash. 2d 1025 (Wash. 1978). In the alternative, the Court should grant certiorari, vacate the judgment of the court of appeals and remand the case with

instructions to certify the dispositive question of Washington law to the Washington Supreme Court.

Respectfully submitted,

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